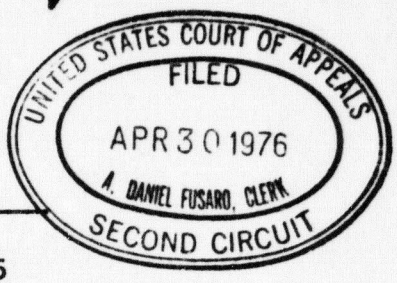
***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

76-7036
76-7115

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT




Docket Nos. 76-7036 and 76-7115

B P/S

ISAAC LORA, etc., et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

- against -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.

Defendants-Appellees.

# REPLY BRIEF OF APPELLANTS

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## STATEMENT

Appellees' response to Appellants' arguments that the lower court clearly erred in summarily denying their motions for a class action and a preliminary injunction is unpersuasive. Moreover, Appellants have a right to appeal from the lower court's refusal to certify their purported class.

## POINT I

**THE LOWER COURTS' ORDER DENYING APPELLANTS CLASS ACTION CERTIFICATION IS APPEALABLE AS OF RIGHT ON THE GROUNDS THAT SAID ORDER WILL RE-**

SULT IN TERMINATION OF THE ACTION BEFORE IT CAN BE FULLY LITIGATED, SAID ORDER LIMITED THE SCOPE OF THE INJUNCTIVE RELIEF SOUGHT IN THE COMPLAINT, AND SAID ORDER MAY BE REVIEWED IN CONJUNCTION WITH APPELLANTS' APPEAL FROM THE LOWER COURT'S ORDER DENYING THEIR MOTION FOR A PRELIMINARY INJUNCTION.

As a general rule, an order denying class action certification, which permits the individual case to proceed, is not a "final" order which may be appealed as of right under 28 U.S.C. § 1291, nor is it an interlocutory order of the kind from which an immediate appeal may be taken under 28 U.S.C. § 1292. Eisen v. Carlisle & Jacquelin ("Eisen I"), 370 F.2d 119, 120 (2d Cir. 1966), cert. den. 386 U.S. 1035 (1967); Jones v. Diamond, 519 F.2d 1090, 1095 (5th Cir. 1975). However, federal appellate courts have developed exceptions to the general rule under which this Court has jurisdiction over the instant appeal from a class action denial.

A.

The "Death Knell" Doctrine

This Circuit has recognized that orders denying class certification are appealable as of right when they

"end the lawsuit for all practical purposes." Eisen I, supra. 370 F.2d at 120.

> "Where the effect of a district court's order [denying a class action motion], if not reviewed, is the death knell of the action, review should be allowed."

See also Green v. Wolf Corporation, 406 F.2d 291, 295 (2d Cir. 1968).

In support of its position in Eisen I, the Second Circuit emphasized the teaching of the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) that appeals are to be heard from orders which,

> "... finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be defined until the whole case is adjudicated."

The Cohen rationale was reaffirmed by the Supreme Court recently in Eisen v. Carlisle & Jacquelin ("Eisen III"), 417 U.S. supra. at 171-172.

Although the "death knell" doctrine has not gained universal acceptance, it has been recognized by other circuits as a legitimate exception to the technical requirement

of "finality" under 28 U.S.C. § 1291. Blackie v. Barrack, 524 F.2d 891, 896 (9th Cir. 1975); OTT v. Speedwriting Publishing Company, 518 F.2d 1143, 1149 (6th Cir. 1975); Monwich Asphalt Sales Co. v. Wilshire Oil Company of Texas, 511 F.2d 1073, 1076-7 (10th Cir. 1975.)*

A sound basis exists for the "death knell" doctrine. Federal courts must give the requirement of "finality" under § 1291 "a practical rather than a technical construction" by evaluating

> "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511..."

Eisen III, supra. at 171. Undoubtedly, when the denial of a class action will efectively terminate the litigation before the case is fully adjudicated, as it will in the instant case, the order must be deemed "final" in nature and, therefore, appealable.

The Second Circuit's opinions on whether orders

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* Two circuit courts have rejected the "death knell" doctrine. See Hackett v. General Host Corporation, 455 F.2d 618 (3rd Cir. 1972) and King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973).

granting class actions are appealable are not apposite to the case at bar. They establish standards which are directed only to defendants appealing from class designations. See Parkinson v. April Industries, Inc., 520 F.2d 650 (2d Cir. 1975); Handwerger v. Ginsberg, 519 F.2d 1339 (2d Cir. 1975); In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). However, they support the premise that class action orders are to be given a "practical rather than a technical construction" (Cohen, supra.) and may be appealed from as of right in certain circumstances.*

Application of the "death knell" doctrine to the instant case is mandated by the teaching of the Supreme Court that, in some cases, a class needs to be certified in order to prevent termination of the lawsuit prior to ex-

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* Three requirements must be fulfilled by defendants to appeal from a class action designation. First, the class determination must be "fundamental to the further conduct of the case." Second, review of the order must be "separable from the merits." Third, the order must cause, potentially, "irreparable harm to the defendants in terms of time and money spent..." Parkinson, supra. at 656. See Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974), where the Court allowed an appeal from a class designation.

haustion of appellate review on the ground of mootness. See Board of School Commissioners v. Jacobs, 95 S. Ct. 848 (1975); Sosna v. Iowa, 95 S. Ct. 553 (1975); Weinstein v. Bradford, 96 St. Ct. 347 (1975). When giving the instant order denying class certification a "practical construction it is apparent that this Court has jurisdiction over the appeal.*

As explained in Point I of Appellants' principal brief, the district court's order has rung "a death knell on the prosecution of the action." See Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1975), cert. den. 417 U.S. 936 (1974). All the named plaintiffs will lose standing to raise the issues involved in the complaint before the case can be completely litigated. Only through class certification can mootness be avoided and the lawsuit be litigated

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* Appellants submit that use of the "death knell" doctrine in the instant case does not broaden its interpretation, but, rather, applies it to narrow circumstances where the ends of justice mandate immediate appellate review. In fact, the "weaknesses" in using the doctrine in securities cases (Parkinson, supra. at 658-660, Judge Friendly concurring) are not evident here. This Court will merely be recognizing the relationship between cases which concern the grievances of public school students and class actions, as expressed by the Supreme Court in Jacobs.

to its conclusion. See Board of School Commissioners v. Jacobs supra.; Sosna v. Iowa, supra.; Weinstein v. Bradford, supra.

At the time the complaint was filed, all the named plaintiffs were assigned to SMED schools. When plaintiffs' motion for class certification was made on November 14, 1975, two of the named plaintiffs had already been returned to regular public schools (White, Moore) and another had been discharged from the public school system (Prince). In seeking class action status, Appellants informed Judge Bruchhausen that class certification was necessary to preserve the forum. They emphasized that the issues raised, by their very nature, would not remain ripe for the named plaintiffs until the lower court proceedings were completed and appellate review was exhausted. See Jacobs, supra. at 850.

The SMED school system contains students only at the junior high school and high school levels, so no child can remain in it for more than a few years. The population is transient. Appellees have stated that about 20% of SMED school students are returned to regular schools each year and that since SMED high schools do not generally grant

diplomas, children must be returned to regular schools before they graduate. (D39, A64).* The time spent in SMED school placement is substantial in the life of a young person, but all the named plaintiffs, and any prospective intervenors, will leave the SMED and regular school systems prior to the exhaustion of appellate review.

Events subsequent to Appellants' lower court class action motion substantiates that their projections concerning the problem of mootness are accurate. Of the four named plaintiffs still in SMED school placement at the time of said motion, one has moved out of the state (Lora), and the remaining three (Walters, Martin, Lugo) have been returned to the regular public school system "on a trial basis." The case presently escapes mootness under the theory that the issues raised are "capable of repitition, yet evading review." Dunn v. Blumstein, 405 U. S. 330, 333 (1972); Moore v. Ogilvie, 394 U.S. 814 (1969). Clearly, there is a "reasonable expectation" that at

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* Numbers in parentheses preceded by "D" refer to paragraphs of the City's Answer. Those preceded by "A" refer to pages of the Appendix.

least those named plaintiffs who have been returned to the regular school system on a trial basis will be again subjected to SMED school placement. Weinstein v. Bradford, supra. at 349; Sosna v. Iowa, supra. at 557-8. But there exists little liklihood that they will retain such standing beyond a few more months and even assuming that regular school placement, not on a trial basis, continues to give them standing, they will all leave the public school system before the exhaustion of appellate review can reasonably be expected.*

B.

Appealability under 28 U.S.C. § 1292 (a)(1)

The district court's order denying class action certification has, in effect, narrowed the scope of injunctive relief available to Appellants and hence, an appeal from the order may be taken as of right under 28 U.S.C. § 1292(a)(1).**

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* In the upcoming September school term plaintiffs Walters and Martin will enter their last school year, plaintiffs Lugo and Moore their next to last year, and plaintiff White his third to last year.

** 28 U.S.C. § 1292 Interlocutory decisions
(a) The courts of appeals shall have jurisdiction of appeals from:
(1) Interlocutory orders of the district courts of the United States,... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

As explained in Point II of their Brief, Appellants are not merely alleging that they alone are being deprived of adequate education and procedural due process, and are being racially discrimated against and subject to other unconstitutional practices. Rather, they contend that such deprivations are common to a large class of minority group children. Their complaint sought permanent injunctions, on behalf of the named plaintiffs and members of their class, sufficient to rectify the unconstitutional acts and omissions alleged (A 48-49). By dismissing the class action aspects of the complaint, Judge Bruchhausen has prevented Appellants from obtaining the broad injunctive relief explicitly requested in the complaint.

In Brunson v. Board of Trustees of School District No. 1 of Clarendon County South Carolina, 311 F.2d 107 (4th Cir. 1962), cert. den. 373 U.S. 933 (1963), black children sought injunctive relief against a school board which was allegedly maintaining a biracial school system. The district court dismissed the class action, allowing the suit to proceed only on an individual basis. The Fourth Circuit took jurisdiction over an appeal from the district court's order under § 1292 (a)(1), stating at 108, that:

In their complaint, the plaintiffs allege that the School Board has maintained dual, biracial school systems, some schools being attended solely by white pupils while all others were attended solely by colored pupils. The plaintiffs sought general injunctive relief, including an order requiring a general reorganization of the school system or, alternatively, the submission of an affirmative plan for the desegregation of all schools in the District. Whether these plaintiffs in this spurious class action might be entitled to the broad injunctive relief sought, we so not now consider, but it seems clear that the order of the District Court effectively denied that relief. The limitation of each plaintiff to an individual action on his own account and the removal of all allegations appropriate to a class action narrowed the scope of possible injunctive relief to an order requiring the admission of a particular plaintiff to a school of his choice. In an individual action maintained by a single plaintiff for his sole benefit and without reference to anyone else, he could neither ask nor hope for more. The order, therefore, was a denial of the broad injunctive relief which the plaintiffs sought, which presumably, would have affected all schools and all grades in the School District. The order was, therefore, an appealable one under § 1292, for it was a denial of the broad injunctive relief which the plaintiffs sought.

Several other circuits have followed the reasoning of the court in Brunson and have taken jurisdiction over appeals, under § 1292(a)(1), from orders denying class actions when "the substantial effect [of the order] is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits." Yaffe v. Powers, 454 F.2d 1362, 1364 (1st Cir. 1972); See Jones v. Diamond, 519 F.2d supra. at 1095-1097 (5th Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974).

Significantly, although the Third Circuit rejected use of the "death knell" doctrine in Hackett v. General Host Corporation, supra., it held, at 622, that:

> "...Eisen is not needed to afford interlocutory appellate review in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief. 28 U.S.C. § 1292(a)(1).... This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitality to class action litigation involving civil rights..."

The instant case presents the paradigm circum-

stances for appellate review of a district court's refusal to certify a class under § 1292(a)(1). Appellants' prayer for an injunction against the deprivation of civil rights of minority group children in SMED school placement constitutes "the heart of the relief" they seek. Jones v. Diamond, supra. at 1095.*

C.

Review of Order Denying Preliminary Injunction Supports Review of Order Denying Class Action Certification

An appeal from an order which is properly before a federal appellate court supports review of a separate order which, standing alone, is not appealable. See San-Filippo v. United Brotherhood of Carpenters and Joiners

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* Although Appellants have not found a Second Circuit decision directly on point, it is noteworthy that in City of New York v. International Pipe & Ceramics Corp., 410 F. 2d 295, 299 (2d Cir. 1969), the Court, in rejecting the City's argument that an appeal should be heard, under § 1292 (a)(1), from a district court denial, after hearings were held, of a class action motion, stated that "[t]he cases cited by the City dealing with injunctive relief sought by school children to prevent discrimination on the ground of race have no application here." Moreover, the Second Circuit has accepted jurisdiction of an appeal from a pre-trial discovery order on the theory that the order "inclines more to the side of mandatory injunctive relief." Parents Comm. of Public School 19 v. Community School Board 14 of New York City, 524 F.2d 1138, 1141 (2d Cir. 1975).

of America, 525 F.2d 508, 512-513 (2d Cir. 1975); Genosick v. Richmond Unified School District, 479 F.2d 482 (9th Cir. 1973).* Hence, since this Court has jurisdiction over the instant Appellants' appeal from an order denying their motion for a preliminary injunction it may also review Appellants' appeal from the order denying class action certification.

Appellants' argument is strengthened because the class action determination directly controlled the subsequent motion for a preliminary injunction. See Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 522 F. 2d 1235 7th Cir. 1975). The injunctive relief which Appellants could have hoped to receive from the court below was restricted to them individually since the class they sought to protect had been dismissed. See pp. 9 to 13, ante.

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* Certainly the argument that judicial economy outweighs the right to appeal certain orders is no longer relevant.

## POINT II

### APPELLANTS ARE ENTITLED TO A PRELIMINARY INJUNCTION

In their Supplementary Brief, Appellants mistakenly relied on the general standard for appellate review of a district court order granting or denying a preliminary injunction - whether the court abused its discretion. Although Appellants submit that the lower court, in fact, clearly abused its discretion, this court is able to exercise its own discretion. (See Supplementary Brief, Points IA and IV).

> "Where, as here, no hearing was held and the court's decision was based on pleadings and affidavits, the credibility of testimony is not at stake. In such a case this Court is not limited to reviewing the district court's exercise of discretion. Since the court rendered its decision on the pleadings and affidavits before it without a hearing, this Court is in as good a position as the district court to read and interpret those documents. Consquently, this Court is able to exercise its discretion and to review the papers de novo."

San Fillippo v. United Brotherhood of Carpenters and Joiners of America, 525 F.2d supra. at 511.

Appellees contend that this Court should be reluctant to interfere with the role of school authorities to

administer and control the educational system. However, they ignore the constant involvement of the federal courts in the education area based upon their responsibility to adhere "to our constitutional heritage, which obligates them to vindicate federal rights" eventhough,

> [o]nce forced to exercise jurisdiction, the federal judge has frequently found himself... administering the penal, education or similar activities under review in order to secure recognition of constitutional rights." (emphasis supplied)

McRedmond v. Wilson, 85-7389 (2d Cir. decided 2/2/76).

A. Appellees have violated the right of SMED school children to due process of law.

Appellees argument that a child can be classified as "socially maladjusted and emotionally disturbed" and segregated into the SMED school system without being given the opportunity to be heard at a due process evidentiary hearing disregards basic Fourteenth Amendment principles. See Goss v. Lopez, 95 S. Ct. 729 (1975); Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972); Point I of Appellants Supplementary Brief. Contrary to Appellees apparent desire, "children do not shed their constitutional rights at the schoolhouse door." Tinker v. Des Moines Community School District, 393 U.S.

503, 506 (1969).

Appellees attempt to divert attention away from the obvious deprivation resulting from SMED school placement by claiming that "there is in the case at bar no deprivation of education to plaintiffs, but merely a transfer to a more appropriate education program." This is unconvincing. (P. 15 of Appellees Brief). The adequacy and appropriateness of SMED school placement is not relevant to Appellants procedural due process claim and Appellants have not yet sought any court ruling on such issue.* Regardless of the merits of the education program for SMED school students, their segregation in a

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* Whether SMED schools provide an adequate and appropriate education can only be answered after trial on Appellants "FIRST CLAIM." However, Appellants submit that many of Appellees allegations concerning the non-discriminatory nature and the educational merits of the system are false or misleading. For example, the mean register of SMED school classes is far above the 6.7 students suggested by Appellees (p. 5 of Appellees' Brief. See, i.e. Deposition of Stanley Snitkof, dated November 19, 1975, p. 17-19; Deposition of Judd Axelbank, dated November 19, 1975, p. 23; Deposition of Martin Grovermar, dated November 19, 1975, p. 18. Furthermore, ancillary services including psychotherapy and intensive remedial assistance are all but nonexistent in SMED schools at the present time. In addition, Appellants find Appellees admission that there is a much higher percentage of minority group students in SMED schools than in other special educational alternatives to be supportive of their discrimination claim (Appellees' Brief, p. 8)

separate school system for the "socially maladjusted and emotionally disturbed" results in a property and liberty loss which is certainly not de minimus. See Point I of Appellants Supplementary Brief.

Furthermore, the fact that the New York State Commissioner of Education has finally promulgated certain "due process" procedures before a child is classified as "handicapped" does not affect Appellants' need for a preliminary injunction. First, the regulations state that they become effective on May 1, 1976. There is no language indicating that they will be applied retroactively to the thousands of children now in SMED school placement.*

Second, the regulations fail to provide students with

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* On page 17 of their Brief, Appellees' counsel states that "We have been informed that the new regulations will be applicable to present SMED students who desire to avail themselves of these procedures." Appellants would like to know who informed the Corporation Counsel that such would be the case given that the regulations indicate otherwise and what procedures would be established to provide comprehensive notice to present SMED students. Courts should be aware of efforts to defeat injunctive relief by protestations of reform. United States v. Oregon State Medical Society, 343 US 321, 333 (1952).

the opportunity for a due process hearing, should they, but not their parents, object to the segregated placement. See pp. 22-23 of Appellants' Supplementary Brief. Students have independent rights to protest constitutional deprivation. Goss, supra.; Mills, supra. See also Bartley v. Kremens, 402 F.Supp. 1039 (3rd Cir. 1975); Kidd v. Schmidt, No. 74-C-605, 9 Clearinghouse Rev. 730 (E.D. Wis. 1975).

Third, the regulations do not provide other essential due process safeguards. The chief school officer of a Board of Education school district cannot be considered an "impartial" hearing officer. Moreover, the burden of proof is not established. In addition, while school records shall be available for review, the Bureau of Child guidance has taken a position that their clinical evaluations are not school records and, thus, not available eventhough they form the basis for SMED placement. See p. 23 of Appellants' Supplementary Brief. Certainly, these factors would at least warrant a hearing in the court below. See Cuyahoga County Ass'n. for Retarded Children and Adults v. Essex, 44 U.S.L.W. 2479 (N.D. Ohio, 4/6/76), where the federal district court held that state regulations governing procedures for placement of children in special education classes lacked necessary due process safeguards.

Finally, Appellees note that Appellants moved for a preliminary injunction more than six months after commencement of the action. However, Appellees, after requesting several extensions of time to answer, did not submit their Answer until October 6, 1975. Once their Answer was received, Appellants scheduled depositions in order to help the court resolve certain factual disputes which would, most likely, arise on a motion for preliminary injunction. Moreover, Appellants had anticipated that the new regulations issued by the Board of Education (Special Circular No. 36) on December 1, 1975 would include due process safeguards that were not included.

Appellants submit that should this court uphold their request for class action designation, Appellees must be ordered to provide all SMED school students with the opportunity for immediate procedural due process.

B. <u>Appellants are entitled to immediate relief against unreasonable search and seizures.</u>

Appellees first seek to obviate the need for a preliminary injunction against searches of Appellants' persons by simply denying that such searches take place. This denial completely ignores the affidavits of Appellants,

submitted in support of this motion, in which each youngster clearly states that while attending a SMED school, he has been forced to undergo personal searches, either daily or on a regular basis. Thses affidavits, coupled with defendant Axelabank's admission that in order to enter his school all children must submit to a personal search, clearly provide grounds for preliminary injunctive relief. It must further be noted that Appellees' only rebuttal to Appellants claims is contained in the conclusory denial of defendants counsel in his opposing affidavit. There is nothing speculative about plaintiffs' statements that in at least the five schools which they have attended, searches do regularly take place. Moreover, in the case cited by Appellees, Rizzo v. Goode, 44 U.S. L.W. 4095 (1976) the constitutional violations complained of were committed by non-parties to the suit. It was largely for this reason that the Supreme Court found insufficient causal connection between defendants and the complained of action to grant injunctive relief. As stated by Justice Rehnquist:

> As the facts developed, there was not an affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners-express or otherwise-showing their authorization or approval of such misconduct.

> Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them but as to the members of the classes they represented.

The instant case presents a clear controversy between the plaintiffs and named defendants who are charged with performing the very acts which the plaintiffs claim violate their constitutional rights.

For example, defendant Axelbank concedes that students cannot enter his school without submission to a search. The Rizzo rationale is not applicable here, where there is an affirmative link between the searches complained of and the named defendants.

After denying that the practice of personal searches is carried on in SMED schools, Defendants then nevertheless seek to justify the use of such searches.

Appellees cite People v. Scott D., 34 N.Y. 2d 483, 358 N.Y.S.2d 403 (1974) to support their contention that in the conduct of searches, school officials are held to a less stringent standard than that to which police are held. However, they ignore the holding of that case, which

invalidated the search in question, and which required in each instance the presence of specific factors to justify a reasonable suspicion prior to the conduct of the search. See also Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975), where the court followed the reasoning of Shelton v. Tucker, 364 U.S. 479, 487 (1960) that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," and held school searches to be unconstitutional.

C. U[illegible] preliminary injunction is granted, Appellants will [illegible]ffer irreparable injury. Moreover, the balance of hardships tips decidedly in Appellants' favor.

The impact of governmental action upon Appellants in this case is enormous. In Goss v. Lopez, the Supreme Court recognized that the exclusion of a child from the educational process for a mere 10 days is a serious event requiring the protections of due process. How much more serious an event is the long term exclusion of minority group children from the regular school system and segregation into a school system for the "socially maladjusted and emotionally disturbed." The damage attendant upon this stigmatizing exclusion, accomplished with no procedural due

process for the child, is clearly apparent.

Equally apparent is the likelihood of irreparable injury from the continuation of personal searches of Appellants. The likelihood was recognized by the New York State Court of Appeals in People v. Scott D., supra. where it stated that "the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable." 358 N.Y.S. 2d at 410.

In view of these serious claims, it is clear that much greater and longer lasting hardship falls upon Appellants than would upon Appellees, where they called upon to provide Appellants and members of their class with a due process evidentiary hearing and refrain from indiscriminate searches. Since the time when procedural due process rights were first asserted, public authorities have unsuccessfully sought to thwart those rights by complaining of undue burden.

## CONCLUSION

**THE ORDERS OF THE LOWER COURT DENYING APPELLANTS MOTIONS FOR A CLASS ACTION AND A PRELIMINARY INJUNCTION SHOULD BE REVERSED IN ALL RESPECTS.**

Dated: Brooklyn, New York
April 30, 1976

Respectfully submitted

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UNITED STATES COURTOF APPEALS
FOR THE SECOND CIRCUIT

*Index No.* 76-7036 and 76-7115

ISAAC LORA, et al.

Plaintiffs-Appellants *Plaintiff*

*against*

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.

Defendants-Appellees *Defendant*

*AFFIDAVIT OF SERVICE BY MAIL*

*STATE OF NEW YORK, COUNTY OF* Kings *ss.:*

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at* 195 Hicks Street, Brooklyn, New York 11201

*That on* April 30, *19* 76 *deponent served the annexed* Reply Brief of Appellants

*on* (1) A. Seth Greenwald, Assist. Attny. Gen. of NYS and (2) Renee Modry, Assistant Corporation Counsel

*attorney(s) for* Defendants-Appellees

*in this action at* (1) Municipal Building, New York, New York 10007 and (2) 2 World Trade Center, New York, New York 10047

*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

*Sworn to before me* this 20th day of May, 1976

Lourdes M. Soto

LOURDES M. SOTO
Notary Public, State of New York
No. 52-4612108
Qualified in Suffolk County
Commission Expires March 30, 1977

Gail Welt

The name signed must be printed beneath

GAIL WELT

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.



*Index No.*

*Plaintiff*

*against*

*Defendant*

**ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL**

*STATE OF NEW YORK, COUNTY OF* ss.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for*

*That on* 19 *deponent served the annexed*

*on*
*attorney(s) for*
*in this action at*
*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

*The undersigned affirms the foregoing statement to be true under the penalties of perjury.*

*Dated*

The name signed must be printed beneath

*Attorney at Law*